

<sup>3</sup> 20 C.F.R. § 501.3(e).

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On November 8, 2006 appellant, then a 52-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed left ankle and foot conditions due to her federal employment duties as of June 15, 2004. She reported that her conditions were caused by her employment duties which required that she stand for 3 to 3.5 hours per day sorting mail and stand for approximately 7 hours per day while making mail deliveries.

OWCP accepted the claim for aggravation of left tibial tendon rupture, contracture of tendon, and enthesopathy of left ankle. On July 9, 2007 appellant underwent left medial displacement calcaneal osteotomy, left gastrocnemius tendon lengthening, left flexor digitorum longus tendon transfer, and left first tarsometatarsal arthrodesis. The surgery was approved by OWCP. On November 24, 2010 appellant had left ankle surgery for removal of hardware and subtalar arthrodesis.

Appellant stopped work intermittently and received medical and wage-loss compensation benefits. On November 23, 2011 she accepted a limited-duty assignment with restrictions of no lifting more than 35 pounds, case route for one to three hours per day, and deliver route for one to six hours per day. On May 16, 2014 appellant again stopped work.

On August 7, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period June 28 through July 11, 2014.

By letter dated August 12, 2014, OWCP requested that appellant submit additional medical evidence in support of her claim for disability. Appellant was afforded 30 days to submit the additional evidence.

OWCP received additional medical evidence in support of appellant's claim.

In an April 29, 2014 medical report, Dr. Pooja Patel, a Board-certified rheumatologist, reported complaints of pain in the neck, back, left hip, left knee, right hip, and right knee. He diagnosed osteoarthritis of the knee, trochanteric bursitis of both hips, and unspecified hand pain. Dr. Patel noted that appellant's physical examination revealed bilateral trochanteric bursitis, bilateral knee crepitus, and neck paraspinal tenderness. He further opined that appellant had degenerative arthritis and trochanteric bilateral bursitis.

In a June 20, 2014 report, Dr. Warren Ray Blount, an emergency room (ER) physician, reported that appellant complained of bilateral feet weakness and trouble walking. He diagnosed chronic foot discomfort.

OWCP received a June 30, 2014 note, wherein Dr. George N. Merritt, a podiatrist, related that appellant was evaluated on that date and could return to work on July 9, 2014.

In a September 23, 2014 report, Dr. Harvey Bishow, a Board-certified orthopedic surgeon, diagnosed aggravation of posterior tibial tendinitis of the left ankle, pes planovalgus of the left foot, chronic posterior tibial tendinitis of the left foot and ankle, and arthritis of the subtalar joint of the left foot. He opined that appellant's job duties aggravated her preexisting injury of posterior tibial tendinitis and was the direct and proximate cause of the diagnoses listed.

By decision dated October 29, 2014, OWCP denied appellant's claim for compensation for disability for the period June 28 through July 11, 2014 finding that the medical evidence failed to establish that her disability from work during that period was due to the accepted work-related conditions.

Appellant filed another Form CA-7 claim for wage-loss compensation for the period September 20 through October 4, 2014.

On November 3, 2014 appellant accepted a limited-duty modified city carrier assignment which provided restrictions of no lifting/carrying over 20 pounds for up to four hours per day; sitting, twisting, pushing, pulling, and simple grasping for up to four hours per day; fine manipulation and reaching above shoulder for up to four hours per day; and standing, walking, and kneeling for up to one hour per day.

On November 4, 2014 appellant requested a telephone hearing before an OWCP hearing representative. She submitted numerous medical reports in support of her disability claim.

In an October 15, 2014 report, Dr. Merritt related that appellant was not fit to go back to work. He noted that he had previously excused her from work commencing July 2, 2014 for a period of six weeks. Dr. Merritt opined that appellant's condition was definitely the result of her work-related injury and although it had been treated surgically, the condition continued to worsen. He explained that a progression of degeneration occurred in the foot where appellant had arthritis. Appellant's joints became more symptomatic because she altered her gait. Dr. Merritt opined that appellant should be excused from work because she was unable to ambulate or use her foot. He questioned whether appellant would have a return of her symptoms if she returned to work.

In a December 15, 2014 report, Dr. Merritt reported that appellant would always have some type of gait instability which would cause undue strain on other parts of her body, such as her knees, hip, and back. He explained that her feet were the foundation of the body and structures, and her knees were affected because they helped carry the load and compensated for the deformities in her feet and ankles.

A hearing was held on June 2, 2015 where appellant testified that her claim should be expanded to include a hip condition. She explained that she did not work during the period June 28 through October 4, 2014 because she would have had to stand on her feet. Counsel for appellant referenced Dr. Merritt's October 15 and December 15, 2014 medical reports in support of her disability claim.

By decision dated August 12, 2015, OWCP's hearing representative affirmed the October 29, 2014 decision in part, finding that the medical evidence of record failed to establish that appellant was disabled from work for the period June 28 and 29, 2014 because appellant had

not been seen by a physician on those dates. The hearing representative found that there was no evidence of record that appellant was unable to work prior to June 30, 2014. OWCP remanded the case for further development of the medical evidence to determine if she was disabled for the period June 30 through October 4, 2014.

Per the instructions of the hearing representative, OWCP referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Jared A. Toman, a Board-certified orthopedic surgeon, for a second opinion evaluation on October 14, 2015. It requested that he identify all medical conditions, including any consequential conditions, caused by appellant's work exposure, and provide rationale in support of his conclusions. OWCP further requested that Dr. Toman determine whether appellant was disabled from work for the period June 30 through October 4, 2014.

In an October 21, 2015 report, Dr. Toman related that appellant's most recent significant surgery was in November 2010 and as such, it was difficult to determine disability as a result of the surgery from June through September 2014. He explained that she had been working until June 2014 and there was no history or evidence of a precipitating or aggravating event which would have caused an exacerbation of her symptoms. Dr. Toman noted that appellant had difficulty bearing weight, and that her altered gait might not have happened had she not undergone surgery on the contralateral lower extremity. He opined that cervical disease, shoulder disease, and abdominal issues were not related to the work exposure or subsequent surgical procedures.

Dr. Toman further explained that appellant was assigned to light duty starting in 2011 with lifting no more than 35 pounds, and with limitations on walking, kneeling, and driving. He reported that pain prevented her from walking, but her hip bursitis had resolved during this time. As to the question of whether appellant was disabled from work, Dr. Toman explained that this depended on the type of work that was available to her. He noted that if she had been able to remain in a sedentary position, it was unlikely that she would have been totally disabled from gainful employment. Dr. Toman reported that based on appellant's description of her usual and customary job, and even the light-duty restrictions she was provided, the exacerbation during this interval may have hindered her ability to both commute to and from work, as well as stand, climb, or drive for protracted periods of time. He opined that she had some level of disability although it was unclear how it developed and how it eventually resolved. Dr. Toman noted that appellant had been off work since January 2015.

On October 29, 2015 OWCP requested that Dr. Toman clarify his opinion with regards to any work-related conditions.

In a January 6, 2016 supplemental report, Dr. Toman reported that appellant's injury was from 2004 and she was complaining about pain approximately 10 years after the date of injury. As such, appellant was not disabled from June to October 2014 based on symptoms arising directly from her injury in 2004. Dr. Toman noted that to imply that all of appellant's current pain and perceived disability were related to a low energy ankle injury was neither correct nor responsible. He stated that appellant's other diagnosed conditions were not related to the 2004 injury. Dr. Toman reported that OWCP's premise for the criteria of disability was flawed as it stated that the capacity for employment was a medical issue. He disagreed stating that it was a

relative capacity issue. Dr. Toman explained that appellant was able to perform activities of daily living which meant that, if matched work of the same demand was available, and she was willing, she would be able to perform some kind of work activity. He further related that if a job was available for appellant which required that she do little more than sit and sort small objects with her hands she would be more than capable of performing full-capacity work.

In support of her claim, appellant submitted medical reports dated August 4 through December 2, 2015 from Dr. Robert R. Reppy, an osteopathic physician. In a December 2, 2015 report, Dr. Reppy reported that appellant had a left foot and ankle work-related injury from 2004 when she was diagnosed with posterior tibial tendon dysfunction. Appellant underwent her first surgery on July 9, 2007 where hardware was placed. In November 2010, she had an additional surgery for a tendon transfer and the rod remained in the left heel. Appellant developed some damage in the right foot consequential to not being able to use the left foot properly, and this required further surgery on January 29, 2013. Dr. Reppy noted that she had worked for the employing establishment since 1988 and her work status since June 10, 2015 had been “no work available that could meet her current restrictions.” He reported that the results of a nerve conduction velocity test done on July 31, 2014 were abnormal with polyneuropathy of the lower extremities affecting both S1 nerve roots. He reported that a July 18, 2014 x-ray of the left foot showed prior fusion of the first tarsometatarsal joint and of the subtalar joints. An x-ray of the ankle revealed degenerative changes. Dr. Reppy diagnosed internal derangement of the left ankle, chronic tendinitis of the posterior tibialis, planovalgus, osteophytes of the left foot, status post tarsometatarsal fusion of the left ankle, and status post wedge resection of the left foot.

By decision dated January 15, 2016, OWCP denied appellant’s claim finding that the evidence of record failed to establish disability from June 30 through October 4, 2014 causally related to her accepted work-related conditions. It based its decision on the reports from Dr. Doman, who served as OWCP’s second opinion physician.

On January 22, 2016 appellant requested reconsideration of the merits of her claim.

In a January 22, 2016 narrative statement, appellant disagreed with the January 15, 2016 OWCP decision, contending that the claims examiner overlooked and misinterpreted pertinent information. She noted that the claims examiner stated that Dr. Toman found it unlikely that she was disabled for the period June 30 through October 2014. However, appellant argued that the claims examiner had not fully read Dr. Toman’s comment as he explained that the question of disability from work relied on the scope of employment that was available to her at that time and if she had been able to remain sedentary, it was unlikely that she would have been totally disabled. She argued that this statement supported her claim because at the time of disability, she did not have a sedentary position and no work was available within her restrictions of one to two hours of walking and standing. Appellant further argued that she was not evaluated by Dr. Toman until October 2015. Because she had not worked since January 2015, her October 2015 evaluation and condition would not have been the same as during her June 2014 period of disability when she had to stop work because her employment duties caused issues with her left foot and ankle. Appellant reported that, Dr. Merritt and Dr. Williams, the ER physicians, documented her condition and treatment, contrary to Dr. Toman’s assertion that there were no medical reports from the period of disability claimed. She concluded that the claims

examiner took too long to issue a decision over the course of 135 days when the decision should have been issued within 90 days.

By decision dated February 12, 2016, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).<sup>6</sup>

In her January 22, 2016 request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. She argued that the claims examiner overlooked and misinterpreted information by failing to fully review Dr. Toman's report in conjunction with her work limitations. Appellant explained that Dr. Toman's report provided support for disability as he explained that if she had been able to remain sedentary at work, it was unlikely she would have been totally disabled. She noted that she did not have a sedentary position and no work was available within her medical restrictions. Appellant further argued that the second opinion physician did not have a complete and accurate record as he incorrectly stated that she did not seek medical treatment during the period of disability claimed, making reference to prior medical reports of record.

The Board notes that OWCP properly reviewed the reports of Dr. Toman, as well as the additional medical reports of record, in its January 15, 2016 decision and found that the evidence of record failed to establish disability from June 30 through October 4, 2014 as a result of her accepted work-related conditions. Appellant did not establish an error on a specific point of law

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<sup>4</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>5</sup> 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

<sup>6</sup> *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

or advance a relevant legal argument.<sup>7</sup> As such, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>8</sup>

The Board notes that the underlying issue in this case was whether appellant was disabled from work for the period June 30 through October 4, 2014 as a result of her accepted work-related conditions.<sup>9</sup> That is a medical issue which must be addressed by relevant medical evidence.<sup>10</sup> A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence. In this case, appellant failed to submit any relevant and pertinent new evidence addressing disability and causal relationship in support of her claim.<sup>11</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>7</sup> A.T., Docket No. 14-417 (issued June 25, 2014).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3).

<sup>9</sup> L.J., Docket No. 14-523 (issued August 7, 2014).

<sup>10</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>11</sup> C.B., Docket No. 08-1583 (issued December 9, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board